

## UNITED STATES DISTRICT COURT

Northern District of California

Oakland Division

EBAY INC. AND MICROSOFT CORP.,

No. C 10-04947 CW (LB)

Plaintiffs,

v.

**ORDER RE 2/10/2012 DISCOVERY  
LETTER**

KELORA SYSTEMS, LLC,

[ECF No. 137]

Defendant.  
\_\_\_\_\_

The district court has referred all discovery matters in the above-captioned patent case and the related cases to the undersigned. Referral Order, ECF No. 77 at 2.<sup>1</sup> On February 10, 2012, Kelora Systems, LLC, eBay, Inc., and Microsoft Corp. submitted a joint letter in which the parties disputed whether eBay and Microsoft must produce emails that are relevant and responsive to Kelora's Requests for Production. 2/10/2012 Joint Discovery Letter, ECF No. 137 at 1.

In the letter, Kelora claims that eBay and Microsoft have not produced emails that are responsive to Kelora's Requests for Production. 2/10/2012 Joint Discovery Letter, ECF No. 137 at 1. Kelora argues that Rule 26 does not provide any carve out for emails, and contemporaneous emails from individuals working to develop and/or promote the search functionality at issue in this case (or any similar search functionality) might be relevant to the *Georgia Pacific* factors. *Id.* at 2. Kelora also contends that it was willing to consider working with Microsoft and eBay to identify an appropriate number of custodians whose emails would be searched. *Id.*

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<sup>1</sup> Citations are to the clerk's electronic case file (ECF) with pin cites to the electronic page numbers at the top (as opposed to the bottom) of the page.

1 eBay and Microsoft argue that Kelora is attempting to create a discovery dispute to increase the  
2 costs of litigation. *Id.* at 4. They observe that Kelora moved to compel email responses on the last  
3 day permitted by the local rules even though it knew of the issue earlier. *Id.* at 2, 4. Microsoft also  
4 notes that Kelora did not meet and confer with it prior to filing the letter. *Id.* And eBay claims that  
5 Kelora's behavior at a deposition indicated that there is no real need for the emails, revealing the  
6 alleged motivation of the letter. *Id.* at 3.

7 Microsoft specifically argues that Kelora's motion should be denied for failing to comply with  
8 the court's standing order as Kelora never sought to meet and confer with Microsoft prior to filing  
9 the letter. *Id.* at 2. Microsoft also claims that it produced responsive emails. *Id.*

10 eBay specifically argues that Kelora's motion should be denied because Kelora has never  
11 explained to eBay how its request satisfies the local rule's proportionality requirement. *Id.* eBay  
12 also contends that Kelora's blanket request for all documents (including emails) is too broad and  
13 burdensome. *Id.* at 2-3. eBay suggests that email production requests should identify the custodian,  
14 search terms, and time frame. *Id.* at 3. eBay further explains that Kelora had notice that eBay was  
15 not producing emails but did not object until towards the very end of discovery. *Id.* Additionally,  
16 eBay observes that Kelora provides no specific reason to believe that emails *would* be highly  
17 probative when it has already received over 100,000 pages of documents from eBay and has spent  
18 three days deposing the senior executives. *Id.* eBay also notes that Kelora itself has not produced  
19 any emails in response to the defendants' requests for the production of documents in this litigation.  
20 *Id.*

21 Microsoft and eBay also suggest that the court might wish to wait to hear the matter because  
22 their motion for summary judgment – which might end the case – is pending before Judge Wilken.  
23 *Id.* at 4.

24 At the hearing, Kelora agreed that there is no longer a dispute regarding Microsoft's production  
25 of emails. Accordingly, the court **DENIES** the motion as to Microsoft.

26 As to eBay, the emails are relevant and Kelora has agreed to meet and confer to discuss  
27 appropriate limitations to address the proportionality concerns. Accordingly, the court **ORDERS**  
28 Kelora and eBay to meet and confer to determine if they can set mutually agreeable parameters  
(custodian, search terms, and time frame) to a search. Given that the court's decision to order any

1 production was close, Kelora is advised to be accommodating in these discussions.

2 This disposes of ECF No. 137.

3 **IT IS SO ORDERED.**

4 Dated: March 2, 2012

  
LAUREL BEELER  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
For the Northern District of California